

The fragmentation of the federal rules

Despite the recognized value of uniform federal rules, the trend today is toward localism.

What is needed is centralized rule making that provides for controlled experimentation.

by **Barry Friedman and Erwin Chemerinsky**

The adoption of the Federal Rules of Civil Procedure in 1938 represented a triumph of uniformity over localism. The lengthy debate over their adoption focused on the value of a national set of rules as opposed to the then-governing practice of "conformity," which dictated that local federal rules were to mirror those of the states in which the federal courts sat. Although many arguments were offered in favor of the federal rules, proponents carried the day by arguing that procedure ought to be the same across the federal courts and the cases those courts heard.¹

Almost 60 years later, the central accomplishment of uniform federal rules is in serious jeopardy. The trend today is away from uniformity and toward localism, though perhaps not consciously so. The federal rules themselves permit individual district courts to enact their own local rules.² While concern about the impact of local rules upon the uniformity of the sys-

tem of federal rules is longstanding, there has been a proliferation of local rules in recent years. Although the ostensible purpose of these rules is not to disrupt national rule uniformity, that often is their impact.

Congress fueled the trend toward localism in 1990 when it adopted the Civil Justice Reform Act,³ whose purpose is to achieve broad-based reforms in the way lawyers and the courts handle federal civil cases. The primary mechanism of the CJRA, however, is individual rule making by the 94 federal district courts and their adjunct advisory committees established under the CJRA to effect reform.

Further, in 1993 the Federal Rules of Civil Procedure were amended in significant ways, particularly with regard to discovery procedure. Framed against the backdrop of the CJRA, the discovery amendments offer an opt-out for any district court that chooses not to participate. Many district courts have taken this option, formulating their own variant of the discovery process. Thus, discovery now operates quite differently in each district.

This fragmentation of procedure is not motivated by a strong drive toward localism. Almost no one argues that the fundamental decision made in 1938 ought to be reversed. Rather, the current trend toward localism appears to be merely a byproduct of a much broader concern about the direction and process of civil litigation generally.

The perception, whatever the reality, is that federal civil litigation is facing a crisis of burgeoning dockets and escalating costs.⁴ Lacking strong central leadership, individual districts adopt local rules to address these perceived problems. Congress, caught in the reform fervor, also opted for local solutions. And when the U.S. Judicial Conference tried its hand at reform, it felt it had little choice but to continue the trend.

Is it really a good idea for every district court in the country to go its own way in developing civil process? The answer, simply put, is no. The ill-considered and unmanaged proliferation of local rules is likely to exacerbate any problems of civil litigation. Different procedural rules will affect substantive justice. Varying procedures will lead to forum shopping, unnecessary cost, and widespread confusion.

The trend to localism

An increasing array of important procedural issues are now dealt with in

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federal courts locally. Generally, this means that the judges in each federal district collectively decide which specific procedures are to be followed

This is a shortened version of *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995).

1. On the enactment of the federal rules and the debate about localism versus uniformity, see Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

2. Fed. R. Civ. P. 83.

3. The Civil Justice Reform Act was part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Civil Justice Reform Act is codified at 28 U.S.C. §471-482 (Supp. II. 1990).

4. On the question of rising litigation costs see Levin and Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985).

within that district. Sometimes, the procedures are even more localized, with individual judges deciding the rules to be followed in their courtrooms. Overall, uniformity among federal districts—and sometimes within them—has been replaced increasingly by divergence.

The Rules Enabling Act provides that the “Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for conduct of their business.”⁵ Thus, federal courts are clearly authorized to promulgate rules of procedure for cases arising within their jurisdictions.

Substantively, all such rules must be consistent with acts of Congress and with rules promulgated by the Supreme Court, such as the Federal Rules of Appellate Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.⁶ In adopting local rules, courts are required to publish them in advance and allow time for public comment.⁷ Rules adopted by a district can be abrogated, by the judicial conference of the circuit or by the U.S. Judicial Conference.

Traditionally, local rules adopted by districts have dealt with relatively minor matters, such as the size and type of paper to be used. In general, local rules have handled practical aspects of litigation not covered by federal rules. Increasingly, however, local rules deal with much more important aspects of court procedure, and there is enormous variance among the districts.⁸

Not surprisingly, local rules have become especially important in areas where there have been great pressures for change in recent years: discovery, settlement, and alternative dispute resolution. Concern about protracted litigation and a desire for greater efficiency have caused districts to adopt rules to better control discovery and to find ways to dispose of cases without trials.

For example, local rules across the country impose various limits on the discovery process: 57 districts limit the number of interrogatories, 15 districts impose discovery cut-off dates, 15 districts limit the number of requests for admissions, one district limits the number of depositions, and one dis-

trict limits the number of requests for production of documents.⁹

The disparity in discovery rules has grown substantially as a result of the revision in Rule 26 of the Federal Rules of Civil Procedure that allows individual districts to opt-out of the reforms. The new version of Rule 26 came into effect on December 1, 1993. As of April 1994, only a third of the districts have adopted the discovery provisions of Rule 26(a),¹⁰ and about half of the districts have formally opted-out of the disclosure rules.¹¹ The result is that discovery rules are increasingly determined at the local level, rather than at the national level, creating enormous disparity among the districts.

Another area where local rules frequently differ is in the way they encourage settlement and the use of alternative dispute resolution. One of the major changes in civil procedure in the past decade has been the rise in attention to ADR. Although the Federal Rules of Civil Procedure do relatively little to encourage the use of ADR, an increasing array of local rules on the topic has been adopted.

For example, the District of Columbia’s rules provide for mediation with the consent of the parties.¹² In the Western District of Washington and the Eastern District of Michigan, cases are assigned to panels of three lawyers who give written notification of their evaluation of the case within one week.¹³ The U.S. Court of Appeals for the Sixth Circuit recently upheld a local rule providing that lawyers accept mediation by their silence in not objecting.¹⁴ In the Northern District of California, certain civil cases are assigned to an in-

dividual lawyer for evaluation.¹⁵

Countless other topics besides discovery and ADR are covered in local rules. Local rules sometimes address the size of the jury,¹⁶ the manner of service of process,¹⁷ and the procedures for summary judgment.¹⁸ The overall result is that substantial areas of procedure are covered by local rules, which differ enormously across the country.

The Civil Justice Reform Act

The Civil Justice Reform Act of 1990 was Congress’s response to frequent calls for court reform in the late 1980s. According to Senator Joseph Biden, the primary proponent of the CJRA, the act “was intended to reverse a recent trend in which one’s bank balance, rather than the merits of the case, controlled a decision to file suit.”¹⁹ The concern his remarks reflected was that the cost of federal litigation had escalated, limiting access to the courts by many segments of society. Moreover, there were concerns about the length of time it took to litigate a case in federal court. According to Congress, these problems of cost and delay, coupled with limitations on judicial resources, were threatening the “just, speedy, and inexpensive resolution of civil disputes in our Nation’s Federal courts.”²⁰

In enacting the CJRA, Congress sought to put its stamp on the procedural process of civil litigation. Congress’s broad goal in adopting the act was to implement a set of changes designed to make the litigation process more efficient. The legislation as originally introduced required that each federal district establish a plan to reduce cost and delay incorporating many specific legislatively defined pro-

5. 28 U.S.C. §2071.

6. *Id.* (“Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.”)

7. 28 U.S.C. §2071(b).

8. The most elaborate and stunning discussion of local rule disuniformity may be in the Judicial Conference’s Local Rules Project’s 1988 Report, discussed in Subrin, *supra* n. 1, at 2020-2021. See also Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L. J. 1011.

9. Shartel, *Case Tracking, Disclosure Provisions Lead the Way in District Reform Plans*, 7 INSIDE LITIGATION 1, 20 (1993).

10. Rooney, *Discovery Rule Lacks Uniformity, Is Source of Confusion: Critics*, Chi. Daily L. Bull., Apr. 23, 1994, at 17.

11. Coyle and Lavelle, *Half of Districts Opt Out of*

New Civil Rules, Nat’l L.J., Feb. 28, 1994, at 5.

12. Grubbs, *A Brief Survey of Court Annexed ADR: Where We Are and Where We Are Going*, 30 TENN. B.J. 20, 27 (1994).

13. *Id.*

14. *Lenaghan v. PepsiCo, Inc.*, 961 F.2d 1250, 1253 (6th Cir. 1992).

15. *Supra* n. 12.

16. See *Colgrove v. Battin*, 413 U.S. 149 (1973) (allowing local rule authorizing six-person jury in civil cases).

17. See *Kroll Associates v. City and County of Honolulu*, 21 F.3d 1114 (9th Cir. 1994).

18. See *Custer v. Pan American Life Insurance Co.*, 12 F.3d 410, 416 (1993).

19. Biden, *Introduction*, 67 ST. JOHN’S L. REV. i (1993).

20. S. Rep. No. 101-416 (101st Cong., 2d Sess.) at 1.

cedures.²¹ A lengthy and sometimes bitter dialogue occurred between Congress and the judiciary over the scope of civil justice reform. The only identifiable result of this process was the tremendous balkanization of the civil rules. The idea of local advisory groups and "bottom up" reform stayed in. The mandatory nature of the reforms, however, was thrown out.²² Thus, these largely amateur advisory groups were set off on their own and told to recommend district-wide reform plans, with little requirement of uniform results.

The legislation's provisions include many aspects designed to inhibit a coherent framework of civil practice. First, and perhaps most important, the CJRA may well permit deviation not only among districts, but from the broad framework of the Federal Rules of Civil Procedure and from other provisions of the U.S. Code as well. There is a sharp dispute about whether Congress intended such deviation. The general counsel of the Administrative Office of the U.S. Courts has taken the view that such deviation is permitted only in very limited circumstances.²³ But Professor Carl Tobias concludes that Congress implicitly, and perhaps expressly, empowered advisory groups to suggest, and districts to adopt, procedures that contravene provisions in the Federal Rules and the United States Code.²⁴ Tobias quotes the U.S. District Court for the Eastern District of Texas as stating, "To the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."²⁵ The

issue awaits resolution in the courts and in the circuit and judicial conference committees that have review authority over the CJRA plans. Whatever the correct legal conclusion, the reality is that the district court plans are deviating from the Federal Rules of Civil Procedure.²⁶

Second, the very nature and responsibility of the advisory groups is likely to lead to ill-advised and balkanized reform. Chief judges were ordered to appoint groups within 90 days, and the legislation required that each group "shall be balanced and include attorneys and other persons who are representatives of major categories of litigants in such court...."²⁷ There was no provision for expertise in either

Even the "model plan" prepared by the Judicial Conference is not a plan so much as a smorgasbord of options, reflecting the many approaches already being taken by various districts.²⁸ Similarly, the Judicial Conference report on early-implementation districts shows tremendous fragmentation. For example, of 34 courts, 26 chose differential case management, and six did not. Of the 26, two decided not to use formal tracks. The remaining 24 that chose formal tracks nonetheless chose numerous different tracking systems. Finally, the evidence suggests that fragmentation is occurring not only interdistrict, but intradistrict as well.²⁹

The 1993 civil rules amendments

The judiciary, or at least the Judicial Conference and the federal rules committees, weighed in on the question of reform with the 1993 amendments to the Federal Rules of Civil Procedure. The most controversial of these amendments were the amendments to Rule 26, which require mandatory disclosure by the parties of certain information at the outset of litigation and

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rule making or social science, skills each group would desperately need. Moreover, with the exception of the U.S. attorney, no member was permitted to serve for more than four years, eliminating any hope of continuity. The heart of the groups' task was entirely discretionary. While required to consider certain reforms, the ultimate recommendations were up to each committee.

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without a discovery request. Three Supreme Court justices dissented on the merits from the order transmitting the rules to Congress.³⁰ A vigorous effort was made to kill these amendments in Congress, an effort that ultimately failed more for scheduling reasons than anything else.³¹

The 1993 amendments exacerbate the problem with fragmentation of the federal rules. The amendments generally are rife with provisions permitting district courts to "opt out" from the federal rules by local rule or order of the court. Opt-out provisions extend to a variety of rules both minor and significant, ranging from the "meet and confer" requirement of Rule 26(f) to modification of the newly presumptive number of interrogatories or depositions permitted under the rules.³²

Prior to the adoption of the Rule 26 amendments, there seems to have been no other such provisions permitting districts to "opt out" of federal

21. See S.2027 (introduced Jan. 25, 1990) at 12.
22. 28 U.S.C. §473 (advisory group "shall consider and may include" CJRA principles) (emphasis added).

23. Levin, *Beyond Techniques of Case Management: The Challenges of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 890 (1993); see also Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1448 (1994).

24. Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, at 51.

25. *Id.*

26. On such conflicts see Robel, *supra* n. 23 at 1452-1453.

27. 28 U.S.C. 5473(b)(6) (Supp. 1992).

28. Judicial Conference of the United States,

MODEL CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 1992).

29. Judicial Conference of the United States, CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (June 1992).

30. 113 S. Ct. 581 (Scalia, J., joined by Thomas, J., and Souter, J.); Also see 113 S.Ct. 575 (statement of White, J.) expressing concern about rule-making process).

31. *Thumbs Down From House Rule Changes*, Cong. Q. Weekly Rep. (Nov. 6, 1993), at 3057.

32. See, e.g., Fed. R. Civ. P. 26(a) ("Except to the extent otherwise stipulated or directed by order or local rule,..."); accord Fed. R. Civ. P. 26(a)(4); 26(b); 26(d).

rules. There have been rules—Rule 16 comes notably to mind—that left certain procedures to the discretion of the district court. Moreover, for better or for worse, local districts might adopt their own general rules regarding such discretionary features. But no rule simply gave district courts the option of ignoring the rule.

The result is a hodgepodge, one for which it is difficult to see the benefits. It is impossible even to summarize the different approaches being taken by district courts, let alone individual judges. The Federal Judicial Center report on how Rule 26 amendments were being implemented concluded that “few of the fifteen largest districts, as measured by number of judgeships, are fully implementing Rule 26(a),” and the center had to rely on charts to summarize all the divergent approaches.³³ The diversity of practice is troubling because discovery most assuredly is a practice that affects substantive rights and litigation outcomes. Undoubtedly, if the relevant information is available, there will be forum and judge shopping based on the diverse application of the rules. Moreover, there is no serious argument that experimentation justifies this crazy quilt, for the nature of the exercise promises highly conflicting and unscientific results.

Reasons for the trend

No single factor accounts for the increased reliance on local decisions concerning procedural rules. Above all, concern with managing the enormous caseloads of the district courts has led to calls for procedural reform and the enactment of local rules throughout the country. Procedural rules are changed to try to make courts more efficient and better able to handle the crush of their caseloads.

At the same time, the lack of consensus as to how to deal with the rise in the federal courts’ caseload also is responsible for the greater divergence among districts. Allowing individual districts to opt-out of the new version of Rule 26 was a political compromise in response to strong opposition to the disclosure provisions. Likewise, permitting individual districts to implement various discovery rules reflects a lack

of national agreement and a compromise to allow the matter to be handled locally. There is a widespread sense of discovery abuse, but not agreement as to how to solve the problem. The result, especially after allowing districts to opt-out of new Rule 26, is enormous divergence in discovery procedures across the country.

Allowing matters to be resolved at the local level also has a political benefit for decision makers: they can duck deciding a hard question by leaving it to local rules to handle. Especially in highly controversial areas where any particular solution is likely to produce intense disagreement, local rules allow the Judicial Conference to propose solutions yet avoid political heat because the actual choices are made at the local level.

A sense of federalism—or more precisely, localism—also explains the increasing lack of uniformity. Although all federal courts are part of the same federal judicial system, there is a view that solutions are often best arrived at locally. In part, this is based on a sense that local participation will produce more satisfaction with the rules and therefore easier implementation. In part, too, there is a view that problems and needs vary across the country and that local rules can best be tailored to local concerns.

Finally, the trend towards local rules is exacerbated by the relatively minimal oversight by federal courts of appeals. The courts of appeals, and the Judicial Conference, have the authority to overrule the local rules. Yet this is very rarely done. Court of appeals judges seem to defer to district court judges as to matters of procedure in the district courts. The courts of appeals seem much more willing to accept disuniformity among districts than to invalidate local rules.

All of these pressures push in one direction: ever more matters covered in local rules and ever more divergence among districts in their rules of procedure.

The case for uniformity

The creation of the Federal Rules of Civil Procedure was undoubtedly motivated, in part, by the desire for uniform procedures in the federal

courts.³⁴ If asked whether the federal rules should be abolished and replaced entirely by local rules, it is safe to say that virtually no judge or attorney would make that choice. The trend towards localism is paradoxical because it coexists with a strong consensus that uniform procedural rules are desirable.

There are many commonly accepted values to uniformity. First, uniform federal rules are fairer to litigants. When rules vary among districts, the costs of litigating can vary enormously among districts. For example, districts with strict limits on discovery might be much less expensive to litigate in than districts without limits on discovery. In addition, the outcome of cases can depend not on the merits, but on the district and its procedural rules. The result of a case might be different, for instance, in a district that pressures settlement and the use of ADR compared with one that does not. It seems unfair that litigant costs and outcomes in federal courts might turn on geography.

Second, uniformity is desirable to avoid forum shopping. The more local rules cover important matters and the more that such rules vary, the greater the amount of likely forum shopping. For instance, if one district has a requirement for mandatory ADR and another does not, lawyers are likely, at times, to choose where to file based on their desire to have or to avoid such mechanisms. Similarly, a lawyer’s desire to have or to avoid the mandatory disclosure provisions of the new discovery rules will affect, and perhaps determine, where the case is filed.

There also is an efficiency-based reason for wanting to discourage forum shopping. The more the two sides in a lawsuit see the costs or outcome depending on the district where the case is litigated, the more there will be fights over venue and jurisdiction. Uniformity in procedural rules thus eliminates one reason why the parties might have lengthy and costly fights over the location of the litigation.

This is closely related to a third justi-

33. 1994 U.S.S.C.A.N. No. 3, 103rd Cong., 2d Sess. at 6130, 6135-36.

34. See Mitchell, *Uniform State and Federal Practice: A Demand for More Efficient Procedure*, 24 A.B.A.J. 981 (1938).

fication for uniformity. If rules vary among districts, lawyers must expend substantial time learning the individual rules for each district. Inevitably, lawyers will sometimes err in dealing with unfamiliar procedures, leading to additional court time in admonishing attorneys and in gaining compliance. Standardization is more efficient, and it does decrease the costs of litigation.

The case against localism

One of the arguments advanced most frequently in favor of local rules is “local custom.”

The argument seems to have two related pieces: first, that conditions differ in different districts requiring different rules, and second, that local actors simply are familiar with doing things a certain way.

Undoubtedly, it is convenient for locales to have rules that reflect local practice, particularly to the extent that local practice means the same as practice in the state courts. This very argument, however, was rejected when the federal rules were adopted. One of the primary arguments in favor of the Conformity Act was that it would be easier for practitioners in a locale to have to learn only one set of rules. The federal rules were adopted despite this plea, largely because it was felt that a system of national courts should run under uniform rules. In other words, national uniformity prevailed over local needs.³⁵

What made sense in 1938 makes even more sense today. While it certainly is correct that much of the practice of law for many attorneys is local, it also is true that increasingly the practice of law is crossing not only state but

national boundaries.³⁶ The premise of the federal courts is that they reflect one court system doing the nation’s business. Permitting a profusion of local rules for the simple reason that local practitioners are familiar with them inappropriately disadvantages out-of-state litigants and their counsel. Absent some better reason, it is insufficient simply to argue in favor of local rules for no reason other than that locals like to do things a certain way.

The argument takes on a bit more force when proponents of localism

Congress, either in the form of new judgeships or curtailed jurisdiction. Although congressional reform has been slow in coming in the past, it seems to do little good to take the heat off by developing a special assembly line for general civil cases that must be handled expeditiously to make way for other cases.

Indeed, the closer one looks, the more doubtful the argument becomes. The advocates of local choice based on local custom or diversity unfortunately do not offer many examples of necessary diversity in local rules.

More often, the argument is stated at a high degree of generality. When examples are given, however, the practice of fragmentation appears even odder. For example, Professor Edward Cavanagh suggests that “minutiae” such as “time limits for filing and responding to motions, the form and content of briefs, the content of final pretrial orders, and

whether the court will entertain oral argument on motions,” is not the stuff of federal rules, and “by and large...turn on local custom.”³⁷ As long ago as the Knox Committee report in 1940, local rules were seen as necessary regarding “rules of admission of attorneys to practice, calendaring motions, and assignment of cases for trial.”³⁸

It is readily apparent that many of these “minutiae” have the ability to affect rights substantially, and virtually none of the items is such that local rules are required. The availability of oral argument or the time available to file motions are good examples of rules that can affect outcomes. Indeed, the very diverse practices of the federal circuit courts with regard to oral argument are somewhat troubling. Oral argument is important or it is not; there ought to be some consensus. Surely the importance of oral argument does not vary by circuit.

Information and management

Some local rules are justified as essentially housekeeping matters. For example, some rules “simply provide[]

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seek to justify local rules on the ground that local conditions differ, requiring a different set of procedures. Dockets may differ significantly in districts due to a heavy caseload of criminal cases or a concentration of products liability cases such as asbestos or breast implants.

While the argument for local rule making based on diversity has some superficial appeal, it does not hold up well under close scrutiny. As stressed above, procedure affects substance; the way the rules work affects outcomes. It may well be that because certain districts are laboring under numerous criminal cases, it is more convenient to change the way civil cases are handled in order to free up judicial time. Or rural districts simply may have smaller caseloads, making it easier to deal with the docket without substantial reform. But despite these factors, changing the procedure in a class of cases to accommodate others is troubling. While this might, within a district, seem an appropriate approach, across district lines it serves to exacerbate unfairness. The answer to overburdening should come from

35. See generally Subrin, *supra* n. 1, at 1999-2011.

36. See Friedman, *Federalism's Future in the Global Village*, 47 *VAND. L. REV.* 1441, 1458 (1994) (discussing how GATT will internationalize practice of law).

37. Cavanaugh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied By Local Rules?*, 67 *ST. JOHN'S L. REV.* 721, 731 (1993).

38. Report to the Judicial Conference of the Committee on Local District Court Rules III (1940) at 7-9, quoted in Subrin, *supra* n. 1, at 2017.

mundane information for lawyers about how, where, and when the court operates.”³⁹ Steven Flanders offers this as a primary and important function of local rules. He cites as examples the hours of the clerk’s office, rules about case assignment, and rules relating to management, the last of which are “essential tools in implementing court policy in administrative matters.”

The first category—rules that simply inform—are unobjectionable, precisely because they are not rules. If they merely inform, but do not require anything of lawyers, then the provision of information is commendable. The only question is whether the information needs to be packaged as a “rule.” Having said this, two related points present themselves. First, obviously any information also in a sense is a rule. If the clerk’s office is open between 9 and 5, then one must file papers between those hours. Second, one reasonably might question the amount of “information” that really must differ from district to district. Why not have the clerk’s offices open at the same time throughout the country so attorneys do not need to guess or try to find the local rule? Despite these two points, one can assume there is some information (directions to the courthouse?) that is useful to all lawyers, might differ among districts, and ought to be published.

To the extent that the local rules require conduct of lawyers, however, these rules—be they for “administrative matters,” “management,” or whatever—still are going to implicate the concerns discussed above. The labels themselves are to a certain extent misleading in that they mask what might be a very real impact on substantive rights.

Interstitial rules

Many rules are justified on the ground they are interstitial. Oftentimes this is explicit, as when Professor Cavanagh explains that local rules are beneficial when they “fill in the gaps left by national rules.”⁴⁰ Other times interstitial rules are explained as being within the district court’s discretionary authority.⁴¹ First, it comes as at least some surprise that there even is a debate about whether local rules in conflict with fed-

eral rules should be permitted. Rule 83 explicitly prohibits this, and for what would seem to be good reason.⁴² What, after all, is the point of having a national rule if local districts may deviate at will? Nonetheless, both the CJRA and the 1993 amendments appear to contemplate local rules inconsistent with national standards.

Second, the field of interstitial rules is—or ought to be—markedly smaller than the “gaps” in the federal rules. One interpretation of interstitial rules might allow for any rule not flat-out contradicted by the federal rules. This, however, is too broad a definition. For example, the federal rules, until recently, set no limits on interrogatories or depositions. By local rule, however, limits were set in some districts. This type of local rule is too fundamentally different in policy from the federal rules to be taken as “interstitial.” Interstitial rules ought to be those that either fill in the local rules where wide discretion is granted, or clear up something left unclear by the national rules. An example might be a local rule setting out the procedure for drafting a Rule 16 order. Rules of broader scope than this also might be appropriate, but they should be seen for what they are: an attempt to formulate important new policy.

With these understandings in mind, such rules still should be the exception. Indeed, such rules never should be permitted to take effect without central approval. While this position no doubt will be controversial, it rests on well-reasoned views about the appropriate level of case management.

Local rules are the least optimal of possible case management techniques; they result most often from an inability or unwillingness to make case management decisions at the optimal level. Much rule making is simply seen as beneath the dignity of a national rule or rule-making body. On the other hand, it is bothersome for a district judge to have to make decisions on a case-by-case basis. But the result is decision making at a level calculated to be least efficient.

Take the frequently offered example of establishing page limits on briefs, or other matters about the form and contents of briefs. Whether the

rule should be national or case-by-case may depend on the type of brief at stake, but there is little apparent benefit to a local rule. The circuit courts each have their own elaborate rules about contents of briefs and page limits. The reason for this local choice is perfectly unclear, however. Appellate briefs are similar and vary little from case to case in their particulars. That is why circuit-wide rules suffice, with exceptions granted by motion. Yet, there is no reason for rules to differ circuit by circuit either. This creates inefficiency, expense, and unfairness, all to no appreciable end.

It should be clear that rarely if ever should a rule turn on conditions unique to a district. If a rule is needed, it is not too trivial to be promulgated nationally. If a rule is not needed, it is not needed. By the same token, cases are different and require differentiated management.

Having said all this, there may well be examples of rules that are necessary and appropriate at the local level. These should not be ruled out entirely. But by the same token, it is essential to establish a mechanism by which local rules are tested by some entity other than the local judges who favor the rule.

Districts as laboratories

In a bow to a fashionable rationale for federalism, one of the most frequent defenses of local rules is that beneficial national rules are often the product of local reforms. Local judges are said to devise solutions to local problems and adopt them as local rules. If several similar approaches are tried in different places, then the experiments that seem to work get adopted as national rules.⁴³ If local rule making is eliminated, critics argue, this process of experimentation will be lost.

While this argument has merit in theory, it runs into serious difficulty in practice. As currently operating, these

39. Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 *LOU. L.A. L. REV.* 213, at 262 (1981).

40. Cavanagh, *supra* n. 37.

41. See generally Flanders, *supra* n. 39, at 221 et seq.

42. See Fed. R. Civ. P. 83.

43. See, e.g., Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 *U. PA. L. REV.* 1567, 1579 (1991).

laboratories are as likely to yield incorrect results as correct ones. Moreover, there is no reason that experimentation must operate from the bottom up, and more reason to believe that it would operate far better from the top down.

What currently passes for experimentation only may do so in the very loosest sense. Leo Levin, former director of the Federal Judicial Center, puts the case succinctly:

To experiment without paying due regard to the resulting data is an exercise in self-contradiction. Nor can impressionistic accounts of the effects of particular procedures substitute for hard data. By the same token, it is of little use to collect data produced by experiments that are so poorly or improperly designed that they cannot serve as the proper basis for solid conclusions. Moreover, it has been wisely said that where human subjects are involved, a poorly or improperly designed experiment "is by definition unethical."⁴⁴

Levin's comment highlights serious deficiencies in both the front and back ends of current process. First, the "design" of existing experiments is extremely poor. For the most part they seem not to be designed at all, but simply put into operation in districts that want to try something new.

Second, innovation often is implemented on the basis of what ostensibly is data, but for the most part reduces to isolated anecdotes. The hearings before the Biden Committee on the CJRA stand as a crowning example. One would hope Congress was not making decisions about national procedural innovation based on random stories about what one judge did with a particular case, or on vague reports of what was accomplished in a district with some innovation. Yet a reader of the hearing transcript is left to almost no other conclusion.

On balance, some careful experimentation may be both commendable and necessary. Experimentation, however, is hardly an argument for local rules fashioned by local districts operating on their own. True experimenta-

tion should occur with strong central control. There should be national debate about which experiments to pursue, and central control to ensure the experiments—to the greatest extent possible—actually yield results.

Recommendations

The current proliferation of local rules and the trend to localized reform and innovation are ill-advised. The very purpose of a system of federal rules was uniformity, and the case has not been made, nor seriously attempted, to over-

True experimentation should occur with strong central control.

throw that regime. Rather, the trends outlined in this article are all the more disturbing because they are occurring without careful consideration, or as a matter of political compromise unrelated to the goals of a functioning procedural system.

For the most part, uniform national rules are a good idea, and local rules are a bad one. Uniformity is desirable for reasons including efficiency and substantive outcome fairness. Local rules are undesirable because they interfere with the system of uniformity and by-and-large offer little real benefit. By the same token, there is some role for disuniformity in appropriate circumstances. The most prominent example is probably the need for some controlled experimentation. But there also may be instances in which local rules are needed to account for local conditions.

Ultimately a stronger system of central control is essential to reassert uniformity while dealing with instances in which local rules are appropriate. While the question of what that central authority should be remains to be answered, it seems at least initially that the authority ought to be an adjunct to, and under the control of, the Judicial Conference. However, such par-

ticipation by the Judicial Conference may be problematic because a body composed entirely of judges may overvalue anecdotes and opinions about reform and be insufficiently attentive both to social science process and to the needs of court users.

In summary, the following principles should guide the federal courts:

- **No local rules should be permitted to go into effect without approval of the central authority.** The criteria for approval should be whether there is a unique local problem that requires its own rule, and whether the unique problem is such that solving the problem justifies the cost of disuniformity.

- **Proposed rules that do not meet the above criteria nonetheless should be considered for national adoption.** The notion that trivial matters are inappropriate for a national rule should be discarded. If there is a needed rule, it should be national in scope. National rule makers should carefully consider whether the subject matter of the proposal should be dealt with on a case-by-case basis. If not, and if a rule is needed but the rule does not deal with a unique local situation, the solution should be a national rule.

- **There should be no opting out of federal rules.** Federal rules should be uniform and national in scope. Political pressures should not be resolved by simply deferring questions to local choice.

- **Experimentation is to be encouraged on a national basis through carefully considered and developed experiments.** When rules deal with significant innovation, the central authority should consider an experiment. Experimentation necessarily must be limited, which means proposals will compete against one another. Significant procedural innovation ought to proceed on the basis of valid data, with some advance idea of pitfalls and how they can be addressed.

There may be some place for local rules. But even that decision should be made nationally. And for the most part, the federal rules should be the rules by which we all play. 🏛️

44. *Id.* at 1590.